Number 11/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision on the Petition for Judicial Review of the Law of the Republic of Indonesia Number 56 *Prp* Year 1960 regarding Stipulation of Farmland Measurement (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431, hereinafter referred to as Law Number 56 Year 1960) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), filed by:

[1.2] **Yusri Adrisoma**, place/date of birth: Subang/October 15, 1950; religion: Islam; occupation: farmer; Nationality: Indonesia; address: Parapatan Hamlet RT 05 RW 03 Tegalurung Village, Legonkulon District, Subang Regency, West Java Province. Hareinafter referred to as **Petitioner**.

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the oral statement and read the written statement of the Experts/Witnesses presented by the Petitioner;

Having heard the oral statement and read the written statement of the Government;

Having read the written conclusion of the Petitioner;

Having read the written conclusion of the Government;

Having examined the evidence presented by the Petitioner;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioner's petition are as described the preceding Facts of the Case part. In substance, the Petitioner requests the Constitutional Court to declare Article 10 Paragraph (3) and Paragraph (4) along with the Elucidation of Article 10 Paragraph (3) and Paragraph (4) of the Law Number 56 *Prp* Year 1960 regarding Stipulation of Farmland Measurement contradictory to the 1945 Constitution of the State of the Republic of Indonesia.

Article 10 Paragraph (3) reads as follows,

"*If the criminal act as intended in paragraph 1 sub-paragraph a of this article occurs, then such transfer of right shall be null and void whereas the land concerned shall belong to the State, without the right to claim for damages in any form whatsoever*".

Article 10 Paragraph (4) reads as follows,

"*If the criminal act as intended in paragraph 1 sub-paragraph b of this article occurs, then except in the event as intended in article 7 paragraph (1) the land area in excess of the maximum measurement shall belong to the State namely when such land is entirely owned by the convict and/or his family members, provided that he is given the opportunity to express his wish as to which part of land is to be imposed with the provision of this paragraph. With regard to the land which belongs to the State, there will not be any right to claim for damages in any form whatsoever".*

The Elucidations of Article 10 and Article 11 read as follows:

"*It has been explained in the General Elucidation point 10 that the matters stipulated in article 10 Paragraph 3 and paragraph 4 do not require any court decision. However, the General Elucidation shall be applicable by law after the enforceable decision of the judges is made stating that it is true that the criminal act intended in paragraph 1 has occurred*".

[3.2] Considering whereas according to the Petitioner, the aforementioned provisions are contradictory to Article 28D Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia which reads as follows: "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law* ".

[3.3] Considering whereas prior to considering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account:

1. The authority of the Court to examine, hear and decide upon the *a quo* petition.
2. The legal standing of the Petitioner in filing the *a quo* petition.

With regard to the aforementioned two matters, the Court is of the following opinion:

Authority of the Court

[3.4] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) as restated in Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law), the Court among other things shall have the authority to conduct judicial review on a law against the 1945 Constitution;

[3.5] Considering whereas the Petitioner's petition is concerned with the judicial review of Law Number 56 *Prp* Year 1960 regarding Stipulation of Farmland Measurement (hereinafter referred to as Law Number 56 Year 1960);

[3.6] Considering whereas in accordance with the provisions stipulated in Article 24C Paragraph (1) of the 1945 Constitution, Article 10 Paragraph (1) and Court Decision Number 066/PUU-II/2004 deciding that Article 50 of the Constitutional Court Law no longer has any binding legal force so that the Court

shall have the authority to conduct judicial review of Law Number 56 year 1960 filed by the Petitioner;

Legal Standing of the Petitioner

[3.7] Considering whereas pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, the Petitioner shall be a party claiming that his/her constitutional rights have been impaired by the coming into effect of a law, namely:

a. Individual Indonesian citizens (including groups of the people having similar interest);
b. units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as provided in law;
c. public or private legal entities; or
d. state institutions.

The Petitioner is an individual Indonesian citizen in his capacity as an heir (Please refer to Exhibit P-13), and therefore, the petitioner is qualified as intended in Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law.

[3.8] Considering whereas besides being qualified as intended in Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law, the Petitioner

must also meet the cumulative requirements to decide that the Petitioner has suffered constitutional right impairment due to the coming into effect of the law petitioned for review, as follows:

a. There shall be constitutional rights granted by the 1945 Constitution of the State of the Republic of Indonesia;

b. The Petitioner believes that such constitutional rights have been impaired by the coming into effect of the law being reviewed;

c. The impairment of such constitutional rights shall be specific and actual in nature or at least potential in nature which pursuant to logical reasoning will take place for sure;

d. There shall be a causal connection (*causal verband)* between the constitutional right impairment suffered by the Petitioner and the law petitioned for review;

e. If the petition is granted, it is expected that the constitutional right impairment as argued will not occur or no longer occurs;

[3.9] Considering whereas the Petitioner argues that he has suffered constitutional right impairment as an heir due to the legal fact experienced by the Petitioner's parent as follows:

a. whereas the Petitioner's parent as a defendant has been brought to trial in the District Court of Subang in the criminal case Number 38/1979/Pidana/PN.Sbg for an alleged violation of Law Number 5 Year 1960 regarding Basic Principles of Agrarian Affairs and the decision was

passed on March 24, 1981 the verdicts of which, among other things, state as follows:

- to declare that Defendant Dukrim, also known as Mr. Kebon son of Suta, based on convincing evidence is proven to be guilty of possessing a land area of 277.645 ha in excess of the maximum limit as provided for in Law Number 5 Year 1960 along with its implementing regulations;
- to sentence the Defendant to imprisonment of 3 (three) months for the aforementioned reason;
- to order that the land area of 277,645 ha after being reduced by the land of the convict inherited from his parent in accordance with the maximum limit pursuant to the applicable provisions shall be confiscated. Subsequently, the Regional Government of the Subang Regency *cq* Agrarian Office of Subang assisted by the District Prosecutor's Office of Subang shall be instructed to further resolve the land issue in accordance with the applicable provisions;

[3.10] Considering whereas the parent of the Petitioner passed away on May 6, 1981 after the Decision of the District Court of Subang had been announced and the Petitioner as an heir filed a petition for Judicial Review to the Supreme Court of the Republic of Indonesia against the Decision of the District Court of Subang. However, based on the Decision of the Supreme Court of the Republic of Indonesia Number 16/PK/Pid/1983, the petition for such reconsideration was rejected;

[3.11] Considering whereas the District Prosecutor's Office of Subang, based on the decision of the District Court of Subang, shall carry out the execution and an exhibit of the land of 277.645 ha wide was presented to the Agrarian Office of Subang on May 8, 1981;

[3.12] Considering whereas the Petitioner as an heir signed a Certificate of Rights Acceptance and Transfer and Compensation Payment (STP3) for the land area in excess of the maximum limit on July 1, 1986 Number A/VIII/534/1986 while until now he has yet to receive any damages although the demand for such damages was proposed by the Head of the Agrarian Office of Subang on October 16, 1986 Number 592/Kad, 1125/1986;

[3.13] Considering whereas based on the foregoing matters, the Petitioner argues that his constitutional rights as guaranteed by Article 28D Paragraph (1), Article 28H Paragraph (4) and Article 28**I** Paragraph (2) of the 1945 Constitution have been impaired and the Court is of the opinion that the Petitioner's statements meet the requirements of the constitutional right impairment as intended in the Court Decision Number 006/PUU-III/2005 so that the Petitioner has the legal standing;

Principal Issue of the Petition

[3.14] Considering whereas at the hearing, in addition to having read the Petitioner's petition, the Court has also examined the written evidence submitted by the Petitioner and heard:

a. Witness presented by the Petitioner (Alan Sutarlan)

- Whereas the witness is acquainted with the Petitioner and there is no family relationship between them;
- Whereas the Petitioner's adoptive parent has a land area in excess of the maximum limit;
- Whereas when the witness held the position as Head of Pangarangan Village in 1979, the Petitioner's adoptive parent namely Mr. Dukrim had farmland located in three villages, namely Tegalurung, Pamanukan Hilir, and Pangarangan with the total land area of 277,645 ha and the land in the Pangarangan village with an area of 22 ha;
- Whereas the aforementioned land was confiscated or seized by the District Prosecutor's Office for which the Prosecutor's Office then issued a letter;
- Whereas there are still many people owning land area in excess of the maximum limit but they are not subject to legal proceedings and in practice, Law Number 56 Year 1960 is not applied;
- Whereas the witness noticed that the Petitioner owned land area of more than 11 ha and the Petitioner was not subject to legal proceedings.

b. Expert presented by the Petitioner (Prof. DR. Arie Sukanti Hutagalung, S.H.,M.LI) ;

- One of the basic principles of the National Land Law is the principle of Just and Civilized Humanity applied in resolving the land issues in accordance with the second principle of Pancasila.
- The National Land Law confirms that the land owned by anyone for any purposes shall be acquired by way of deliberations to reach a consensus in respect of both the surrender of the land and the remuneration. Only under compelling situations, when it is required to take the land by force for implementing public interest project, through the expropriation of the titles to land the procedures and provisions of which are provided for in Law Number 20 Year 1961 regarding Expropriation of the Titles to Land and the Objects Thereon. (State Gazette of the Republic of Indonesia 1961-288, Supplement to State Gazette of the Republic of Indonesia 2324).
- The lack of damages for the party committing the violation as provided for in Article 10 Paragraph (3) and Paragraph (4) is contradictory to the principles of the National Land Law and the Principles of the Land Acquisition as the basis for the development of the National Land Law.
- There are several articles which are no longer relevant to the current socio-economic situation. For instance, the provision on reporting in Article 3 which heavily depends on the knowledge of the concerned parties about the existence of such

provision and the legal compliance level of the society in terms of the calculation on the number of families and the designation of the populous area and non-populous area. Therefore, it is time for the government to amend Law Number 56 Year 1960.

c. Government (National Land Agency);

- Whereas from the sociological and philosophical perspectives, the stipulation of the limitation of the farmland measurement is based on the idea that land basically has a social function (Article 6 of the Agrarian Law). Hence, in respect of the ownership, use, and utilization of land by a person holding the titles to land, the people's interest and public order shall be considered. In addition to that, the measurement limitation in farmland ownership principally is imposed in order to prevent the occurrence of the accumulation of the land ownership by some people which can harm the public interest;
- The criminal sanction in Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 is forcible means against a person disobeying the obligations and prohibitions set forth in the laws and regulations so as to achieve order, regularity, and/or justice. Such sanction is one of the characteristics of law, imposed to make the law implementation more effective;

- Law Number 56 Year 1960 is one of the substantial laws in the context of creating social justice for all the people of Indonesia which is entirely in accordance with the 1945 Constitution and the Agrarian Law ;
- Following its enactment on January 1, 1961 up to now, Law Number 56 Year 1960 has still been judicially and sociologically applicable. The effectiveness of the provisions of Article 10 Paragraph (3) and Paragraph (4) has been evident since 1961 up to 2007 based on the data collected by the National Land Agency of the Republic of Indonesia. For instance, the maximum land area in excess of 121.605,9412 ha and absentee have been reported by its owner along with the damages of Rp.58,520,949,063 granted to the former land owners of 31,593 complying with their obligations (Table 1 and Table 2);
- Article 10 Paragraph (3) and Paragraph (4) is still effective in managing and developing the legal and political framework as well as the future land policies (Agrarian Reform), especially for preventing the recurrence of the concentration on control and ownership of land or in other words, preventing the existence of the land area in excess of the new maximum limit;
- Law Number 56 Year 1960 implementing the provision of Article 17 of the Agrarian Law has provided a balanced regulation between public rights and private rights since the

private rights of ownership are not taken over arbitrarily, as evidenced by the damages granted to those complying with the provisions;

- Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 along with its Elucidation is not contradictory to Article 28H Paragraph (4) of the 1945 Constitution.

[3.15] Considering whereas with regard to the *a quo* Petitioner's petition, the Court is of the following opinion:

Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960

[3.15.1] Considering whereas the Petitioner has argued that the definition of the clause *"if the criminal act occurs"* in Article 10 Paragraph (3) of the Law Number 56 Year 1960 which reads, "*If the criminal act as intended in paragraph 1 sub-paragraph a of this article occurs, then such transfer of right shall be null and void whereas the land concerned shall belong to the State, without the right to claim for damages in any form whatsoever"*, implies that there is no legal certainty *(rechtsonzekerheid)* for the people owning land area in excess of the maximum limit which is only applicable to the people committing the criminal act as set forth in Article 10 Paragraph (1) Sub-Paragraph a of the *a quo* law;

[3.15.2] Considering whereas in addition to that, the Petitioner argues that in practice, many land owners owning land area in excess of the maximum limit are left unexamined in spite of their violation of Law Number 56 Year 1960. As a

result, the Petitioner is of the opinion that the provisions of Article 10 Paragraph (3) and Paragraph (4) of the *a quo* law have created legal uncertainty;

[3.15.3] Considering whereas the land as a part of the "earth" as set forth in Article 33 Paragraph (3) of the 1945 Constitution is "controlled" by the State and shall be used for the greatest prosperity of the people;

[3.15.4] considering whereas the Court in its Decision Number 002/PUU-I/2003 in respect of Judicial Review of Law Number 22 Year 2001 regarding Oil and Natural Gas and Decision Number 058-059-060-063/PUU-III/2005 in respect of Judicial Review of Law Number 7 Year 2004 regarding Water Resources has interpreted the definition of the word "controlled" as the word which is not identical with the word "owned";

[3.15.5] Considering whereas by regarding the 1945 Constitution as a system, the definition of the words "controlled by the State" in Article 33 of the 1945 Constitution gives a higher or wider definition than the that of ownership in the concept of civil law. The concept used by the State shall be a legal concept placing the State as the highest organization (*heerschappij)* having sovereignty over a particular territory, in this case, the territory of the State of the Republic of Indonesia;

[3.15.6] Considering whereas the definition of the words "controlled by the State" may be in the form of the authorities to perform "the act of maintaining" *(beheersdaad),* "the act of managing" *(bestuursdaad),* "the act of regulating"

(regelsdaad), “the act of supervising” *(toezichthoudensdaad)*. With the aforementioned four authorities, the State can give the titles to land in the form of property rights, rights of cultivation, rights to build, and rights of use to the legal subjects both public and private. In addition to that, the State may revoke the rights if according to the State, the public interest requires such rights. Hence, in connection with the agrarian issues (land in general), Article 33 of the 1945 Constitution is elaborated in the Agrarian Law. Particularly with respect to farmland, as a further regulation of the Article 7 and Article 17 of the Agrarian Law, Law Number 56 Year 1960 has been stipulated as its implementing law. Law Number 56 Year 1960 provides for the limit of farmland measurement allowed to be owned by an Indonesian citizen. Thus, the State has regulated land ownership with its consequences;

[3.15.7] Considering whereas Law Number 56 Year 1960 has stipulated that the ownership of farmland is not allowed for land areas measuring more than 20 ha, except for particular areas which can measure 25 ha such as rice fields, unirrigated land, or a combination of both. Similarly, Law Number 56 Year 1960 provides that as from the coming into effect of the *a quo* law to Indonesian citizens acquiring/owning farmland of more than the maximum limit determined, Indonesian citizens are obliged to put in efforts to reduce their farmland area so that it is not more than the maximum limit within no later than 1 year as from the land acquisition;

[3.15.8] Considering whereas Article 3 of Law Number 56 Year 1960 provides that, "*People and households whose family members control farmland the measurement of which exceeds the maximum limit shall be obliged to report such matter to the relevant Agrarian Head of the Regency/Municipality within 3 months as from the coming into effect of this Regulation. If it is deemed necessary, the period may be extended by the State Minister for Agrarian Affairs"*;

[3.15.9] Considering whereas Article 4 of Law Number 56 Year 1960 provides that, "*People or households owning landfarm the measurement of which exceeds the maximum measurement shall be prohibited from transferring their title to the whole or part of the land, except with the permit from the relevant Agrarian Head of the Regency/Municipality. The permit can only be granted if the land the title of which is transferred does not exceed the maximum measurement and the permit shall consider the provisions of Article 9 Paragraph (1) and Paragraph (2)*";

[3.15.10] Considering whereas Article 6 of the Law Number 56 Year 1960 provides that, "*Any person who after the coming into effect of this regulation acquires farmland in such a way that the farmland he/she or his/her family member controls exceeds the maximum measurement shall be obliged to put an effort to reduce their farmland area so that it is not more than the maximum limit by no later than 1 year as from the land acquisition"*;

[3.15.11] considering whereas Article 7 of Law Number 56 Year 1960 provides as follows: Paragraph (1):"*Any person controlling farmland with liens the duration*

of which has been 7 years or more as of the coming into effect of this Regulation shall be obliged to return such land to its owner within a month after the plants thereon have been harvested without the right to claim for any redemption money". Paragraph (2): "*With regard to liens the duration of which has been less than 7 years as of the coming into effect of this Regulation, the land owner shall be entitled to ask for his/her land back any time after the plants thereon have been harvested by paying redemption money the amount of which is calculated based on the following formula:*

$$\frac{(7 + 1/2) - \text{duration of lien}}{7} \times \text{pledge money}$$

provided that once the lien has lasted for 7 years, the lien holder shall be obliged to return the land without any payment of redemption money within a month after the plants thereon have been harvested". Paragraph (3): "*The provision of paragraph 2 of this article shall also apply to the liens created after the coming into effect of this Regulation*";

[3.15.12] Considering whereas Article 10 of Law Number 56 Year 1960 provides as follows:

Paragraph (1) : *"Shall be sentenced to a maximum imprisonment of 3 months and/or imposed with a maximum penalty of Rp.10,000-*:

a. any person who violates the prohibitions included in article 4;

b. any person who does not perform his/her obligations as intended in article 3, article 6, and article 7 paragraph 1;

c. any person who violates the prohibitions included in article 9 paragraph 1 or does not perform his/her obligations as intended in article 9 paragraph 2.

Paragraph (2) : *"The criminal act intended in paragraph 1 of this article shall be a violation."*

Paragraph (3) : *"If the criminal act as intended in paragraph 1 sub-paragraph a of this article occurs, then such transfer of right shall be null and void whereas the land concerned shall belong to the State, without the right to claim for damages in any form whatsoever".*

Paragraph (4) : " If the criminal act as intended in paragraph 1 sub-paragraph b of this article occurs, then except in the event as intended in article 7 paragraph (1), the land area in excess of the maximum measurement shall belong to the State where if such land is entirely owned by the convict and/or his family members, provided that he is given the opportunity to express his wish as to which part of the land is to be imposed with the provision of this paragraph. With regard to the land which belongs to the State, there will not be any right to claim for damages in any form whatsoever".

[3.15.13] Considering whereas based on the aforementioned articles of Law Number 56 Year 1960, which clearly provide for the maximum limit of the farmland measurement allowed to be owned by individual/family of Indonesian nationality and if this law is violated, the criminal sanction against such violation*(overtredingen)* shall be imposed upon the citizens, the Court is of the opinion that the provisions of the *a quo* law have in fact provided for clear rules or legal certainty *(rechtszekerheid)* in the context of restructuring the land ownership *(landreform),* particularly farmland so that the mandate of Article 33 Paragraph (3) of the 1945 Constitution as further elaborated in the Agrarian Law (particularly Article 7 and Article 17) can be realized in Law Number 56 Year 1960 reflecting the social function of land and land ownership;

[3.15.14] Considering whereas the lawmakers have made the right choice in determining the qualifications for the criminal acts intended in Law Number 56 Year 1960 in the form of violations *(overtredingen)* because land issues basically belong to the scope of the domestic public law. Therefore, the sanctions imposed shall basically be administrative sanctions. However, criminal sanctions as a supplement to the administrative sanctions may be imposed provided that the criminal acts shall meet the qualifications of criminal acts of violations *(overtredingen)* instead of criminal acts of crimes *(misdrijven)*.

[3.15.15] Considering whereas based on the foregoing explanation, the provisions of Law Number 56 Year 1960 have clearly provided legal certainty *(rechtszekerheid)* so that the Petitioner's arguments cannot be accepted. If in

practice, there are some farmland owners who do not report or have not reported their farmland measurement while they know that their land's measurement is more than 20 ha and the criminal sanction is not imposed upon them as it has been the case with the Petitioner's parent, shall be an issue of implementation (law enforcement) of the *a quo* law rather than an issue of constitutionality of legal norms. Hence, the Court does not have the authority to make a judgment on such case;

[3.15.16] Considering whereas the Petitioner has argued that the clause *"the land concerned shall belong to the State, without the right to claim for damages in any form whatsoever"* in Article 10 Paragraph (3) of Law Number 56 Year 1960 is a severe sanction whereas the criminal acts intended in the *a quo* law are only violations and are not crimes. According to the Petitioner, the damages for taking over the farmland for land area acquired in excess of the maximum limit allowed to be owned by individuals/families should have been in accordance with Article 17 Paragraph (3) of the Agrarian Law;

[3.15.17] Whereas the takeover (seizure) of the land area in excess of the limit by the State is not a severe sanction since in the criminal issues in accordance with the formal and material penal law, it is possible for the evidence to be seized/confiscated to be further annihilated or utilized. In the case of this land, in accordance with the provisions of Article 33 of the 1945 Constitution *juncto* the Agrarian law, land has a social function to be used for the greatest prosperity of the people. Therefore, the land in excess of the maximum ownership limit by an

Indonesian citizen violating the provision of Law Number 56 Year 1960 shall be seized to be further redistributed to the people or other citizens in accordance with the provisions of applicable laws and regulations.

[3.15.18] Considering whereas in accordance with the Agrarian Law, the damages may be granted if the land seized by the State is delivered in accordance with the provisions as provided for in Law Number 56 Year 1960. Otherwise, the damages would not be given. Hence, the Court is of the opinion that the Petitioner's arguments stating that the seizure of land which is the excess of the maximum limit allowed to be owned is a severe sanction shall be groundless and unacceptable;

[3.15.19] Considering whereas the Petitioner has referred to the Elucidation of Article 10 and Article 11 of Law Number 56 Year 1960 which reads as follows, "*It has been explained in the General Elucidation in point (10)*". Subsequently, in order to properly implement the provisions of this regulation, the criminal sanctions, are, as required, stipulated in Article 10 and Article 11 which read as follows, "*The matters stipulated in Article 10 paragraph (3) and paragraph (4) do not require a Court Decision but they shall apply by law after there is an enforceable Decision of the Judges stating that it is true that the criminal act intended in paragraph (1) has occurred"*. The Petitioner is of the opinion that if there is no Court Decision, there must be no legal certainty. In response to the foregoing statement, the Court is of the opinion that the Elucidation of Article 10 of the *a quo* law is in accordance with the principles in formulating laws and

regulations where in practice, as it has been the case with the Petitioner's parent, the Court Decision has followed the provisions as stipulated in Article 10 of the *a quo* law;

[3.15.20] Considering whereas Article 17 of the Agrarian Law has stipulated that the maximum and minimum measurement of the land owned shall be provided for by the laws and regulations. In other words, according to the Petitioner, such matter shall be regulated based on the government's policies. Therefore, the matter can be regulated either by the Government itself by way of issuing a Government Regulation or by the Government in cooperation with the People's Legislative Assembly by way of issuing a law. In view of the importance of such issue, the government is of the opinion that such matter shall be provided for by a regulation the level of which is equal to law and since at that time, the matter was under such a pressing situation that the criterion of "in a state of exigency" was met. Therefore, such matter shall be regulated in a Government Regulation in Lieu of Law. According to the Petitioner, the Government Regulation in Lieu of Law which subsequently became a law was created for the purpose of equal distribution of life in the context of the Indonesian socialism which, according to the Petitioner, has now lost its relevance as the Indonesia state no longer adopts the Indonesian socialism principle. According to the Petitioner, the Government o the Republic of Indonesia itself shall revise the *a quo* law derived from the Government Regulation in Lieu of Law since the *a quo* law has long been applied for 47 years which makes it outdated;

[3.15.21] Considering whereas furthermore, according to the Petitioner, the making of the Law Number 56 Year 1960 did not meet the criteria for formulating a law based on the 1945 Constitution particularly Article 20 Paragraph (1) and Paragraph (2); According to the Petitioner, since the *a quo* law was made in a short period of time and under a pressing situation and thus the law was not properly made by involving the People's Legislative Assembly. In fact, the *a quo* law was firstly stipulated as a Government Regulation in Lieu of Law when *PRP* Laws should no longer exist. Hence, according to the Petitioner, the Government and the People's Legislative Assembly are obliged to immediately formulate a new law in accordance with the era and technological development in agriculture and fisheries for the purpose of farmers' welfare;

[3.15.22] Considering whereas with regard to the aforementioned arguments in the Petitioner's petition, the Court is of the opinion that the requirement for the making of the Government Regulation in Lieu of Law shall be the existence of a state of exigency. At that time (1960), the requirement of state of exigency set forth in Article 22 of the 1945 Constitution was based on a subjective assessment of the President so that the Government Regulation in Lieu of Law regarding Farmland Measurement was stipulated and then submitted to the People's Legislative Assembly and ratified as Law Number 56 *Prp* Year 1960. Hence, procedurally and substantially, there was no violation of the 1945 Constitution so that the Petitioner's arguments to the extent they pertain to the Government Regulation in Lieu of Law are groundless;

[3.15.23] Considering whereas the Petitioner argues about the existence of the constitutional rights with regard to ownership granted by the 1945 Constitution namely in Article 28H Paragraph (4) which reads, "*Every person shall have the right to possess personal property rights and such property rights shall not be taken over arbitrarily by anybody".* According to the Petitioner, it is clear that the property rights are guaranteed and protected by the 1945 Constitution, while the property rights shall be the most powerful and the fullest inherited titles to land which a person can possess in view of the provision of Article 6 of the Agrarian Law as confirmed by the Elucidation of Article 20 of the Agrarian Law explaining the characteristics of the property rights and their difference from other rights. **The property rights** *shall be the most powerful and the fullest titles to land a person can possess*. According to the Court, the most powerful and the fullest characteristics given, based on the Elucidation to Article 20 of the Agrarian Law, do not mean that such rights are absolute rights which are without limit and incontestable as the *eigendom* rights according to the definition of the W.B. This is because such characteristics are evidently contradictory to the characteristics of the customary law and social function of each right. In fact, the Agrarian Law and Law Number 56 Year 1960 are based on the customary law. The words "the most powerful and the fullest" are intended to distinguish the property rights from the rights to build, rights of cultivation, rights of use, and other rights.

[3.15.24] The Court is of the opinion that the constitutional rights consisting of the Human rights spelled out in Article 28A through Article 28J of the 1945 Constitution and other rights of the citizens included in the 1945 Constitution

shall include the property rights to assets therein. The property rights to Land which are very powerful right (inherited from generation to generation) as set forth in the Agrarian Law may be limited in accordance with the provisions of Article 28J Paragraph (2) of the 1945 Constitution. Such limitation of farmland measurement as provided for in Law Number 56 Year 1960 shall be no more than 20 ha. This is not contradictory to the 1945 Constitution. In addition to that, based on the foregoing explanation, the land and its ownership rights shall have a social function. Law Number 56 Year 1960 is intended to restructure the land ownership (*landreform*) so as to realize the social function of land as the implementation or manifestation of Article 33 Paragraph (3) of the 1945 Constitution which reads, “land shall be controlled by the state and shall be used for the greatest prosperity of the people”;

4. CONCLUSION

Considering whereas according to the Court, based on the foregoing Court’s explanations, Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 has been in accordance with the matters provided for in the Agrarian Law so that it is not contradictory to Article 28D Paragraph (1), Article 28H Paragraph (4), and Article 28I Paragraph (2) of the 1945 Constitution. Hence, the Petitioner’s petition is groundless and shall be rejected.

5. RULINGS

In view of the provisions of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the Decision

To declare that the Petitioner's petition is rejected;

Hence this decision was made in the Consultative Meeting of Justices on Tuesday, September 18, 2007 attended by nine Constitutional Court Justices and pronounced in the Plenary Meeting open for public held today Thursday, September 20, 2007 attended by Jimly Asshiddiqie, as the Chairperson and concurrent Member, Maruarar Siahaan, H.A. Mukthie Fadjar, Soedarsono, H.A.S. Natabaya, I Dewa Gede Palguna, H. Harjono, H.M. Laica Marzuki, and H. Achmad Roestandi, respectively as members, assisted by Eddy Purwanto as the Substitute Registrar, as well as in the presence of the Petitioner, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Jimly Asshiddiqie

JUSTICES,

Maruarar Siahaan **H. Abdul Mukthie Fadjar**

Soedarsono **H.A.S. Natabaya**

I Dewa Gede Palguna **H. M Laica Marzuki**

Harjono **H. Achmad Roestandi**

DISSENTING OPINIONS

With regard to the aforementioned Court Decision stating that the Petitioner's petition is rejected, three Constitutional Justices have the following dissenting opinions:

[6.1] CONSTITUTIONAL JUSTICES MARUARAR SIAHAAN, ABDUL MUKTHIE FADJAR, AND SOEDARSONO.

[6.1.1] The subject matter that must be taken into consideration shall be whether Article 10 Paragraph (3) and Paragraph (4) along with the Elucidation of Article 11 of Law Number 56 Year 1960 is contradictory to the 1945 Constitution particularly Article 28D Paragraph (1), Article 28H Paragraph (4) and Article 28I Paragraph (2), which reads as follows:

Article 10 Paragraph (3), "*If the criminal act as intended in paragraph 1 sub-paragraph a of this article occurs, then such transfer of right shall be null and void whereas the land concerned shall belong to the State, without the right to claim for damages in any form whatsoever*".

Article 10 Paragraph (4), *"If the criminal act as intended in paragraph 1 sub-paragraph b of this article occurs, then except in the event as intended in article 7 paragraph (1) the land area in excess of the maximum measurement shall belong to the State namely when such land is entirely owned by the convict and/or his family members, provided that he is given the opportunity to express his wish as to which part of land is to be imposed with the provision of this paragraph. With regard to the land which belongs to the State, there will not be any right to claim for damages in any form whatsoever".*

[6.1.2] The penal Provisions of Article 10 and Article 11 of the *a quo* law constitute sanctions with respect to the limitation of the maximum land measurement allowed to be owned by a family or entity as stipulated in the *a quo* law as the implementation of Article 7 and Article 17 of the Agrarian Law which was made in a short period of time with a Government Regulation in Lieu of Law ratified as Law in 1960 and which came into effect on January 1, 1961. The Petitioner's parent who owned land area in excess of the allowed maximum limit and did not report such excess as set forth in Article 3 of Law Number 56 Year 1960 has been brought to trial and declared guilty so that the land area in excess

of the maximum limit was subsequently confiscated by the State without any damages.

[6.1.3] The constitutionality of the abovementioned norm as argued by the Petitioner will be reviewed against Article 28D Paragraph (1), Article 28H Paragraph (4), and Article 28I Paragraph (2), which respectively read as follows;

Article 28D Paragraph (1), *"Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law".*

Article 28H Paragraph (4), "*Every person shall have the right to possess personal property rights and such property rights shall not be taken over arbitrarily by anybody".*

Article 28I Paragraph (2)," *Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment".*

[6.1.4] In our opinion, the constitutional provisions which are relevant to be used as a test case for the provisions of Article 10 Paragraph (3) and Paragraph (4) shall be Article 28 H Paragraph (4) whereas Article 28D Paragraph (1) in relation to the rights to equal treatment before the law and Article 28I Paragraph (20) regarding the prohibitions against discrimination and that that the cause of action (*posita*) part of the Petitioner's petition is less relevant since the arguments pertain more to the implementation of the law while the norms reviewed are

declared applicable to every person. The subject matter that must be taken into consideration now shall be the additional punishment in the form of confiscation of land area excess by the State (as it has been the case with the Petitioner's parent) without any damages as he has violated the prohibition from possessing land area excess as stipulated in Law Number 56 Year 1960 constitutes an arbitrary takeover prohibited in Article 28H Paragraph (4).

[6.1.5] Before making an analysis of the existence of arbitrary element in Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960, we are of the opinion that it is better to first consider the Government's statements represented by the National Land Agency about the structural poverty and social injustice as the basic issues faced by the Indonesian people which must be resolved by way of Agrarian Reform, which basically aims at restructuring the ownership structure and land control and utilization for the sake of justice and the people's welfare. The Government states that Law Number 56 Year 1960 is a substantial law applied to realize social justice and welfare for all the Indonesian people which is consistent with Pancasila, the 1945 Constitution, and the Agrarian Law. Basically, all people agree with such statement and accept the fact that the Agrarian Law is still relevant to be used as a legal basis for the aforementioned Agrarian Reform program. This is because the provisions of the Agrarian Law itself which only spell out basic legal concepts, principles, and provisions with an up-to-date constitutional basis despite the four amendments to the 1945 Constitution are still considered as policies consistent with the goal of Proclamation goals in the Preamble of the 1945 Constitution without ignoring the

global economic situation affecting the paradigm of land law development and development in general which also require parallel adjustment to the changes of the socio-political and global economic conditions as well as the 1945 Constitution amendments.

[6.1.6] The Agrarian Law laden with democratic disposition as a product of its era is a masterpiece of Indonesia in terms of legislation which is one of the important pillars in implementing the independence's goals. However, in its implementation or realization, the Agrarian Law which only spells out concepts and principles still depends on many laws as political products which must be made and will then be influenced by the developing political system and with the changes in the conditions and political system under the same 1945 Constitution, the Agrarian Law, as explained, requires adjustment to and review of its basic law. Moreover, in practice, the implementation of the Agrarian Law and laws related to the developing political system in the era after the masterpiece was made was sociologically and empirically influenced by the socio-political situation and dynamics of the era. As a result, the people's perceptions were formed by such socio-political situation and dynamics in viewing the Agrarian Law and laws related to it.

[6.1.7] Even though the Government in the past and the present time has put in enormous efforts to eliminate the image that the Agrarian Law has not been a product influenced by the Indonesian Communist Party (PKI). However, a contrasting image prevails generally among some members of the community.

Such image or perception was a fact established in the community after the government transition from the Old Order Regime to the New Order Regime in October 1965. The apparent indicators of the considerations, opinions, and basis of the Agrarian Law referring to the political characteristics, situation, and dynamics in its era with such jargons like **National revolution, Political Manifesto, and Our Revolution Implementation (*Jarek*)** which are still inherent in the Agrarian Law have contributed to forming such perception. The statement of the State Secretary in during Soeharto's administration on November 21, 1988 stated that in order to "*purify the ideological position of the Agrarian Law…it is deemed necessary to immediately eliminate the perceived image of its relation to communism"* (Budi Harsono, 2005: 236), and this proves that such image and perception are factually established in the community. This requires a strong image to create. Even though, in our opinion, such image has currently disappeared if viewed merely in terms of the inherent political jargons in the era considered irrelevant to the extent they are related to the Agrarian Law, such image is not entirely eliminated. Therefore, it is deemed necessary to review the concept spelled out in the law in relation to the Agrarian Law as a masterpiece of the Indonesian people as further elaborated in its implementing law such as Law Number 56 Year 1960.

[6.1.8] Although the Agrarian Law is still considered relevant and legitimate in the implementation of the Statehood's current purpose, massive and radical developments in the era have made it necessary for Law Number 56 Year 1960 to be amended. This is because in addition to the constitutional issue of Article

10 Paragraph (3) and Paragraph (4) considered problematicized by the Petitioner, the paradigm of the state administration and development, population growth, and global socio-economic relationship has resulted in the stipulation of the maximum limit and the return of the pledged land without any repayment the pledge money. In the light of the economic analysis, the decisions on the formulation of laws and regulations in the financial economic field applied and adhered have made such laws require new legitimacy, especially with the fact that the prohibitions stipulated in the *a quo* laws can easily be breached through other legal institutions legally applicable. Maintaining the law without renewing the paradigm used would indicate inconsistency in the economy and investment policies adopted by the new legislation resulting in certain difficulties to Indonesia. This especially happens when the minimum land ownership by every family in Indonesia is considered constitutional, as it can be perceived as creating a new constitutional obligation of the State and the Government of the Republic of Indonesia to provide land for all families owning land measuring less than the established minimum limit. As a result, the burden and duty of the State will become disproportionate and not in accordance with the statehood paradigm which is currently understood and adhered to, especially after the four amendments of the 1945 Constitution.

[6.1.9] The qualification of an act of a person who owns land area in excess of the maximum limit stipulated in Article 1 Paragraph (2) of Law Number 56 Year 1960, who does not report such excess as required in Article 3, and who transfers the property right to the excess land without any permit of the Agrarian

Head as prohibited in Article 4 of the *a quo* law is stipulated as a criminal act of "violation" in Article 10 Paragraph (1) and Paragraph (2). In such case, the excess land area in shall belong to the State without any right to claim for damages. The general system of the penal law can include an additional punishment in the form of confiscation of **the goods or objects used for committing crimes or as the results of crimes** as provided for in Article 39 Paragraph (1) of the Indonesian Criminal Code. The word **can** in Article 39 of the Indonesian Criminal Code refers to the discretionary authority of the judges to pass such additional punishment which must consider particular conditions, especially if the goods or objects are owned by a third party. Paragraph (2) of the Indonesian Criminal Code also stipulates that in the case of criminal act of violation, the additional punishment may be imposed provided that it is stipulated by law. However, such category is rarely found or practiced due to justice or equity reasons and propriety. The criminal act of "violation" is a light criminal act with respect to which the proportion between the criminal act committed and the goods resulting from the crime or a tool for committing the crime owned by the defendant must be taken into consideration. An example of the criminal act of violation included in the provisions as stated in Article 39 Paragraph (2) of the Indonesian Criminal Code is Law Number 2 Year 1981 regarding Legal Metrology in lieu of *Ijksordonantie* 1949, *Stb* 1949-175. Article 33 Paragraph (2) of Law Number 2 Year 1981 stipulates that as a criminal act of violation, the act of putting, showing, using, offering for sale, selling or offering for rent a gauge, a measuring device, and a scale which are not legally stamped/re-stamped by the

authorized officer, and Paragraph (3) stipulates that the evidence of such violation can be seized, but if the seized evidence is not confiscated, the evidence will not be returned before such tools are legally stamped or re-stamped.

[6.1.10] Land considered having a magical relationship with its owner is very meaningful to every person and is an economic resource which is very fundamental in human's life. Therefore, its regulation shall consider such important psychological and magical factors in the decision-making and in establishing the norms regulating the relationship between human and land. The ownership of the large land area, basically, if it is not acquired due to crimes or a result of crimes, is never considered as bad (*mala in se*) in the community, except in the community adhering to Marxism, Leninism, or Communism which distinguish between the class of large farmland owners and capital owners called the bourgeois or the capitalists, and farm workers called the proletarians. The control of the tools of production is considered as a crime since the tools are considered as have been used as exploitation tools resulting in the gap and sources of destitution for the working class and farm laborers. Such control is then used as the basis for takeover in the collective control by the State. However, the welfare state viewpoint, which does not consider the existence of a crime committed by a land owner as the cause of poverty and gap, tries to build an economic and social system based on the restructuring of the general control and ownership of farmland as further realized in the landreform and agrarian reform programs in order to alleviate such gap and poverty. However, the

landreform concept as a policy formulated in the Agrarian Law as agrarian basic rules does not adopt the takeover method without any damages. The emphasis is put on the allocation and reallocation of economic resources as a policy to overcome the gap and to reach collective welfare as the public interest.

[6.1.11] With regard to the rules criminalizing the ownership of the land area in excess of the maximum limit as set forth in Article 1 *juncto* Article 10 Paragraph (3) and Paragraph (4) of Law number 56 Year 1960 with the qualification of ”violation” instead of crimes, since its true characteristic in the human history is not *mala in se,* where such act becomes a criminal act not because of the quality of the act, but rather as a consequence of the laws and regulations made and applied by the authority. The act is not considered as something bad in itself in the legal awareness of the public. Therefore, the restructuring of land control and ownership structure by such laws and regulations used as a tool of social engineering must be consistently guided by the principles of the 1945 Constitution and the Agrarian Law emphasizing that the land area in excess of the maximum measurement allowed to be owned shall not be arbitrarily taken over and that the damages must be granted to its owner. The rules on the confiscation of the excess land area without any damages as a result of negligence in reporting such excess considered fair by the Government as an enforcement tool as a consequence of the violation committed for an effective implementation of the landreform and agrarian reform, are, in our opinion, irrational and disproportionate. The principle of **proportionality** is a manifestation of **justice** which has become one of **the general principles of law**

and good governance based on which the policy-makers can conduct a survey before making a decision to adopt the rules *in casu*, whether the confiscation without any damages shall be applied (i) if the goal of the *landreform*/agrarian reform can be achieved by other measures, (ii) if the goal can be achieved better and more effectively through such measure based on a better efficiency criterion, and (iii) if the issue dealt with can be resolved more effectively by such authority.

[6.1.12] The moral and ethic values in the Preamble of the 1945 Constitution formulated in Pancasila as national principles constitute the nation's philosophy of life and become a guidance to understand the provisions in the corpus of the 1945 Constitution as further formulated in the substance of legislation inferior thereto. By having such values, it can be understood that the basic value of justice is a moral and ethic value which also manages the relationship between individuals and the community where there must be a **balance** of guarantee of the existence or presence of groups or individuals. Similarly, in placing such relationship in terms of law when the changes of the expected socio-political system and constellation occur, both the methods and purposes must be in the spirit and context of the moral and ethic values adhered to in the basic law as the authority source of the legal rules established.

[6.1.13] Actually, Indonesia has never adhered to a view that considers the **owner** of the excess land area which is not a result of a crimes as an **enemy**, as placed in the ideology of class conflict in the past and the ownership of the land area in excess of the maximum limit allowed is not ***mala-in se*** in human history

as explained above. If, through the changes of the social, political, and legal systems, the policy stating that the ownership of land area in excess of the maximum limit without being reported shall constitute a criminal act of violation **(*mala prohibita*)** shall be formulated, then such policy has placed the law as a tool to achieve the goal of social justice (law as a tool of social engineering*).* However**,** the legal function of the theory adopted must consider the justice aspect and keep away from the arbitrary attitude. In order to be just and not to be arbitrary, both the owner of the land area in excess of the maximum limit allowed and groups of people who do not own land but have benefited from the *landreform* and agrarian reform programs shall **proportionally** have a better condition (***better-off)*** and do not lead either party to a worse condition than before (***worse-off).***

[6.1.14] The existing public perception views Law Number 56 Year 1960 as a product which is greatly influenced by the unjust Indonesian Communist Party (PKI) since in the history of the socio-political and economic development and dynamic in Indonesia, land control had become the center of attention and the activity of mass political conflict as from the making of the *a quo* law until the outbreak of the G-30-S PKI. This subsequently made the implementation and application of the law in the territory of Indonesia after the changes of the political system ineffective because the *a quo* law was no longer considered applicable. This situation was also supported by the statement of Prof. Dr. Ari Sukanti Hutagalung SH.MLI, the Expert presented by the Petitioner who has conducted a special research on the matter. On the other hand, the data on the land takeover

by means of criminal proceedings based on Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 as applied against the Petitioner's parent could not be presented at all by the Government, except the data on the groups of people who voluntarily handed over their excess land with damages therefor. In fact, Table 1 used by the Government to support the argument about the effective application of the rules of Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 regarding the granting of damages for excess land, proves otherwise instead;

All of the conditions have actually resulted in disobedience to the rules of Article 10 Paragraph (3) and Paragraph (4). This is because it is evident that the law as **the ruler's instruction** is not the only criterion for identifying the validity of a law. The compliance with the proportionality between criminal acts of violation based on the *a quo* law and sanctions justly imposed shall be an important element (***constitutive element***) of the legal norms in Article 10 Paragraph (3) and Paragraph (4) of the *a quo* law as demanded by the 1945 Constitution. The absence of **justice** as **the constitutive element of the legal norms** mandated by the Preamble of the 1945 Constitution as the moral and ethic values in the legal system obtaining legitimacy and established based on the 1945 Constitution has made it impossible for such law to be considered constitutional. This is because not only legal justice and social justice aspects but moral justice aspect must also be considered for a legal norm to be valid and that it shall constitute an inseparable part of the nation's philosophy of life as spelled out in the preamble of the 1945 Constitution. In order to be an effective law, an

instrument and also a method in which a concept of justice can be more reflected in the law itself are required to guarantee the obedience to the regulations.

[6.1.15] Universally, the takeover of individual property rights by the State for the interest of the public is acknowledged, provided that such takeover meets the following three requirements, (i) there is a law legalizing such takeover, (ii) the property taken over must be used for public interest, (iii) fair damages must be granted (V.N. Sukhla, 1997:238). Likewise, it has been accepted as the general principle in the public international law and international civil law that the property takeover or control by way of nationalization must be conducted with both **"prompt, adequate and effective"** damages (Sudargo Gautama, The Fourth Book 1989:159,160 and 215; Martin Dixon and Robert McCorquodale 1991 : 511) and **appropriate compensation.**

[6.1.16] The property takeover without any damages through an additional punishment based on the Court decision in relation to land is only allowed for the reason that the confiscated goods has been used as a tool for committing crimes or has been obtained as a result of crimes. If the law containing the State policy is an effective social process to compromise with the different and conflicting interests of citizens, the principles of balance, rationality, and proportionality must be adequately taken into consideration. If such requirements are not met, such **norm** is considered **arbitrary** and therefore contradictory to Article 28H Paragraph (4) of the 1945 Constitution.

[6.1.17] Based on the aforementioned reasons, we are of the opinion that the Petitioner's petition is well-grounded and it is advisable for the Court to grant the petition by stating that Article 10 Paragraph (3) and Paragraph (4) of Law Number 56 Year 1960 is contradictory to the 1945 Constitution and to declare that does not have any binding legal force.

SUBSTITUTE REGISTRAR,

Eddy Purwanto